

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION

FILED
Clerk, U.S. Bankruptcy Court

NOV 7 1997

WDNC, Charlotte, NC
By: SCM, Deputy Clerk

In Re:) Case No. 97-31740
)
ROBERT LEE SMITH and EVY P. SMITH,) Chapter 13
)
Debtors.)

JUDGMENT ENTERED ON NOV 7 1997

ORDER DENYING FEES

This matter is before the court on the Objection to Claim of SouthTrust Mortgage Corporation filed by debtors. After considering counsel's arguments at the hearing held October 28, 1997, the court has determined that SouthTrust's claim for trustee/attorney's fees should be denied.

1. Debtors executed and delivered a Note and Deed of Trust securing an indebtedness for real property in the principal amount of \$102,500 on August 24, 1990. SouthTrust Mortgage Corporation became the holder of the note.

2. The Deed of Trust provides for a "Trustee Fee" in the amount of "5% of the gross sales price" in the event that the power of sale is invoked by the noteholder.

3. Debtors defaulted on the note. SouthTrust notified debtors of the default, and retained Robert Critz as substitute trustee. SouthTrust began foreclosure, and on June 10, 1997, the clerk of superior court in Cabarrus County authorized foreclosure under the power of sale provision in the deed of trust.

4. The foreclosure sale was scheduled for July 11, 1997. Debtors filed a Chapter 13 bankruptcy petition the same day as

18

the scheduled sale. The automatic stay went into effect and the foreclosure sale was stopped. Debtors have retained possession of the property.

5. SouthTrust filed a Proof of Claim in the debtors' bankruptcy on August 13, 1997 with the Chapter 13 standing trustee.

6. SouthTrust's Proof of Claim lists their secured claim in the amount of \$104,912.40 (the "payoff" amount). Included in this figure is SouthTrust's arrearage claims. The "Arrearage Breakdown" in the Proof of Claim includes a claim for "Attorney Fees" of \$4671.36, which are the subject of debtors' objection.

7. The \$4671.36 figure has been listed by SouthTrust and Critz in various ways:

a. **"Attorney Fees"** in the Proof of Claim dated August 13, 1997 in the amount of **\$4671.36**.

b. **"Substitute Trustee's Fee"** in the amount of **\$2455.20** in a memorandum dated May 12, 1997, which outlined the reinstatement amount prior to the foreclosure hearing. Also listed in the memorandum are other expenses:

\$50.00 court costs

\$175.00 evidence of title

c. **"Substitute Trustee's Fee"** in the amount of **\$3936.66** in a "Client Billing Worksheet" dated July 14, 1997. Also listed on the sheet are other expenses:

\$175.00 title fee

\$209.70 publication fee

8. 11 U.S.C. § 506(b) provides that:

To the extent that an allowed secured claim is secured by property the value of which . . . is greater than the amount of such claim, there shall be allowed to the holder of such claim, interest on such claim, and any reasonable fees, costs, or charges provided for under the agreement under which such claim arose.

(emphasis added).

9. N.C.G.S. § 45-21.15 determines the allowable compensation for trustee's services. It provides:

(3) If the instrument provides for compensation for the trustee's services in actually holding a sale, but does not provide compensation for the trustee's services when no sale is actually held, the trustee is entitled to compensation as follows: (i) one-fourth of the completed sale compensation before the trustee files the notice of hearing; (ii) one-half after the filing of the notice of hearing; and (iii) *three-fourths after the hearing.*"

(emphasis added).

10. Debtors suggest that the above code and statute provisions require the application of a reasonableness standard in the determination of trustees' fees and costs. Because of the fundamental deficiencies in SouthTrust's claims cited below, the court does not find it necessary to reach this issue.

11. SouthTrust's Deed of Trust specifies a 5% "Trustee Fee." The trustee proceeded through the steps of foreclosure as far as the foreclosure hearing before the automatic stay went into effect. Under N.C.G.S. § 45-21.15, therefore, the trustee would be entitled to 3/4 of 5% of the "completed sale compensation."

12. However, under 11 U.S.C. § 506(b), the fee must be "reasonable." The court finds that the fees claimed in the amount of \$4671.36 are not reasonable for the following reasons:

a. Each bill was for a different amount of either "attorney fees" or "trustee fees" and included different

associated charges.

b. There is no evidence before the court that the amounts listed in addition to the "trustee fee" were either expended or related to the collection of the debt in foreclosure.

c. Most importantly, the court cannot determine how the "trustee fee" was calculated by SouthTrust and therefore cannot find that it is reasonable. The figures provided by SouthTrust and the trustee do not equal the amount claimed when calculated according to the statute. From the evidence provided, the court itself has been unable even to calculate the amount that would be due under the note and statute ($3/4$ of 5%) because the figures provided vary bill to bill and are unsubstantiated. Even after the court requested further documentation of the figures and calculations from counsel for SouthTrust, the figures provided did not produce the amount claimed in the Proof of Claim when calculated in accordance with the statute and added to the additional items claimed.

13. For the purposes of this case it is not necessary to decide the principal of whether the reasonableness standard applies to trustee fees because of the fundamental failure of the trustee to substantiate his claim. Even in the absence of application of the reasonableness standard, a claim must be supported by facts. Here, what the claim is for and the amount of the claim has not been different every time the trustee has been asked for documentation. That in itself belies the pure

application of the formula in N.C.G.S. § 45-21.15. The trustee's claim here is so fundamentally flawed that it must be denied without ever rising to the point of deciding the interplay between the code and the statute.

For all the above reasons the court has determined that it must sustain debtors' objection and deny the claim of SouthTrust. It is therefore **ORDERED** that SouthTrust's claim is hereby **DENIED**.

November 7, 1997



George R. Hodges
United States Bankruptcy Judge